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UTAMA MERCHANT BANK BHD

v.

CAWIS WIRA SDN BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL SUIT NO: D4-22-403-2003]
24 DECEMBER 2004

C ***CIVIL PROCEDURE:*** *Summary judgment - Appeal against - Triable issues - Whether raised - Mala fide - Allegation of - Whether proved - Rules of the High Court 1980, O. 14 r. 1*

D ***CIVIL PROCEDURE:*** *Summary judgment - Loan - Restructuring - Restructuring plan of loan - Proposal of - Rejection of proposal by plaintiff - Whether refusal proved to be unreasonable, inequitable and mala fide - Whether issues requiring a trial arose - Whether defendants failed to show triable issues - Rules of the High Court 1980, O. 14 r. 1*

E This was the defendants' appeal (encl. 13) against the decision of the senior assistant registrar allowing the plaintiff to enter judgment against the defendants under O.14 r.1 of the Rules of the High Court 1980. An RM8 million facility was granted by the plaintiff to the first defendant on 12 December 1996 and was secured by 3,331,670 shares in Hexagon Holdings Berhad (HHB) F and guarantees by the second and fourth defendants. On 4 June 1998, a supplementary facility agreement was entered into revising the loan down to RM5 million. On 31 May 2001, a letter was issued agreeing, under a restructuring plan of the loan to the first defendant, amongst other things, to make monthly payments of G principal at RM13,000 per month to reduce the principal sum. On 11 January 2002, the first defendant proposed disposal of 2 million shares as part settlement and plaintiff responded by asking for further details from the defendants. On 22 January 2002, the first defendant notified the plaintiff that it intended to sell 2 million H HHB shares and the timing of the shares was to be dependant upon market sentiment. The defendants also submitted that on 28 January 2002, the plaintiff had rejected the proposal. The plaintiff filed a writ of summons on 17 March 2003. An application for summary judgment under O. 14 by way of a summons in chambers I was filed on 30 April 2003 which was granted. Hence, this appeal. The defendants attempted to show that there were triable issues by relying upon the argument that if the plaintiff had acceded to

and accepted the first defendant's proposal, it would have substantially reduced the outstanding debt of the first defendant and the liability under their guarantees of the second to fourth defendants. In further pursuit of the argument that there were triable issues, the defendants submitted that the refusal by the plaintiff was unreasonable, inequitable and *mala fide.*

Held (dismissing the appeal):

(1) At the material time of the proposal, the first defendant was in arrears of his restructured payment schedule, and had failed to place a further 1 million non-moratium shares of HHB and to pay the interest which was to be kept current and payable monthly. The plaintiff's letter of 28 January 2002 required the defendants to attend to the terms of the restructuring exercise before the defendants' proposal could be considered favourably. It was, therefore, for the defendants to respond to that letter or comply with those agreed terms before their proposal would be considered. It was not an outright refusal on the part of the plaintiff. This question of fact required no trial as it was solely based upon a consideration and appreciation of the written communication between the parties, and which documents were produced before this court. (paras 15)

(2) The effect of the defendant's proposal in encl. (6) exh. A of 11 January 2001 to the plaintiff would be to return to the first defendant to dispose of the same, upon a time of its choice, the very shares that had been charged to the plaintiff and which was, therefore, at the disposal of the plaintiff to protect its own interest. These terms, in the light of the fact that the defendants had not complied with the terms agreed upon in the restructured plan, would place the plaintiff under added risk, since by returning the shares to the first defendant for disposal by the first defendant at the time of its choice, the plaintiff would lose its right under the terms of the security to dispose off the shares to protect its interest. It was, therefore, not unreasonable to respond to such proposal by requiring the first defendant to comply with the terms of the restructure as agreed before it could be considered favourably. No issue requiring a trial arose. (para 16)

(3) The suggestion that the price of shares was between RM2 – RM2.50 per share was denied by the plaintiff. Exhibit E being the prices of HHB shares was challenged as being a statement from the first defendant. That was answered by the first defendant in his second affidavit by exhibiting the prices from 'The Star.' In the absence of any evidence from the plaintiff to dispute the accuracy of the report from The Star, the court could accept the same as correct, and that it substantially supported the first defendant's assertion of the price of the shares. It was then no longer an issue of fact to be tried. No issue requiring a trial arose. (para 17)

(4) The defendants have argued that the disposal of 2 million shares at RM2.00 would reduce the outstanding sum and the balance would be adequately secured by the remaining 1.3 million shares. Having so averred that the outstanding sum could be substantially reduced, the defendants did not provide what was the actual outstanding sum, what the balance would be after the reduction, and when the sale and the reduction would be effected. Without such particulars, there was nothing before the court to enable it to consider judicially whether the refusal, if the letter of 28 January 2002 was held to be a final refusal, was unreasonable, inequitable and *mala fide*. There was no material before the court for judicial consideration for the exercise of its discretion whether there was an issue of fact to be put to a trial. (para 18)

(5) The proposal was for the right to sell not immediately but that the timing of the shares was to be dependant upon market sentiment. It was evident that the defendants themselves were not certain that the material time was the best time for a sale. The argument advanced by the defendants had only the wisdom of hindsight. It was clear that the defendants have not suggested an immediate sale. These findings of mixed fact and law rested entirely upon the law and the first defendant's own proposal letter. No issue requiring a trial arose. (para 19)

(6) The defendants have clearly failed to show there were any issues of fact in this case that required a trial. The issues raised were only matters of submissions. There were no triable issues as such. On the basis of the material before the court, there was no basis to conclude the action of the plaintiff was unreasonable or inequitable. The defendants have also not set

out before the court the nature of evidence it relied upon to prove *mala fide* to enable the court to decide whether there were indeed triable issues as to *mala fide*. (para 20)

Case(s) referred to:
Bank Negara Malaysia v. Mohd. Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***
Palk & Anor v. Mortgage Services Funding Plc [1993] Ch 330 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 1, O. 15

For the plaintiff/respondent - Nicole Wee; M/s Chooi & Company
For the defendants/appellant - Tan Keng Teck; M/s Lim Kean Leong & Co

Reported by Suhainah Wahiduddin

JUDGMENT

The Background

[1] Enclosure (13) is the defendants' appeal against the decision of the learned senior assistant registrar allowing the plaintiff to enter judgment against the defendants under O. 14 r. 1 of the Rules of the High Court 1980.

[2] An RM8 million facility was granted by the plaintiff to the 1st defendant on 12 December 1996. The facility was secured by 3,331,670 shares in Hexagon Holdings Berhad (HHB) and guarantees by the 2nd to the 4th defendants.

[3] On 4 June 1998 a supplementary facility agreement was entered into revising the loan down to RM8 million.

[4] On 31 May 2001 a letter was issued agreeing, under a restructuring plan of the loan to the 1st defendant, amongst other things, to make monthly payments of principal at RM13,000 per month to reduce the principal sum.

[5] On 11 January 2002 1st defendant proposed disposal of 2 million shares as part settlement (see encl. 6 exh. A). Plaintiff responded to ask for further details from the defendants.

[6] On 22 January 2002 the 1st defendant notified the plaintiff that it intended to sell 2 million HHB shares and the timing of the shares was to be dependant upon market sentiment. The 1st defendant says the price of shares were then between RM2 - RM2.50 per share (encl. 6 exh. E; encl. 8 exh. F).

[7] The defendants say that on 28 January 2002 the plaintiff rejected the proposal.

[8] The plaintiff filed a writ of summons on 17 March 2003. An application for summary judgment under O. 14 by way of a summons in chambers was filed on 30 April 2003.

[9] The senior assistant registrar granted summary judgment on 27 July 2004.

The Issues Raised By The Defendants

[10] The defendants try in this appeal to show there are triable issues by relying upon the argument that if the plaintiff had acceded to and accepted the 1st defendant's proposal, it would have substantially reduced the outstanding debt of the 1st defendant and the liability under their guarantees of the 2nd to 4th defendants. In further pursuit of the argument that there are triable issues, the defendants say that the refusal by the plaintiff was unreasonable, inequitable and *mala fide.*

The Law As To Applications Under O. 14 r. 1 Rules Of High Court 1980

[11] Supreme Court held in *Bank Negara Malaysia v. Mohd. Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 that:

> Under an Order 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an Order 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable.

[12] Litigation under the adversarial system, whether commenced by a writ of summons or originating summons, is essentially based upon a contest of assertions which are arguably supported by the evidence that the party can produce. It is trite that disputes of law and interpretation do not require a trial as these issues are for the court to make a ruling upon after hearing the submissions of counsel. When an assertion of fact is disputed, the court must take a step further and determine if that dispute of fact is triable. The term "triable" does not mean simply capable of being tried. If that were so, then depending upon the wilfulness of the parties, every issue or question of fact is triable. To serve the public meaningfully, the court as a public institution, has a responsibility to apply its resources to hear and dispose of the cases before it not only fairly and justly, but also expeditiously. The time and resources of the court are, therefore, not at the free disposal of the parties, but must be allocated judiciously. The rules of court have sought to do so. The term "triable issue" is not, therefore, any issue of fact a party demands or even agree, to be tried. If the issue of fact is a question of inference or conclusion to be drawn from other facts that are not disputed, no trial is necessary. The inference or conclusion to be drawn is a matter for submissions in a hearing. If a fact, other than one of inference or conclusion to be drawn, is in issue, and the determination of it requires the conflicting oral evidence relating to it to be examined and tested in the court for their reliability in terms of accuracy and credibility, then only a trial is necessary. Only such an issue is properly described as a triable issue.

[13] In an affidavit based application, it is not enough to assert a fact in an affidavit. An assertion is not evidence. When an assertion is disputed, the onus lies upon the maker of that assertion to tender his evidence in a further affidavit, if he has not done so in his earlier affidavit where the assertion was made. In such case, the plaintiff: (a) in the case of documentary evidence, must tender such evidence by exhibiting the same; or (b) in the case of witness evidence, to set out the nature of his evidence that supports his assertion, in his affidavit. If he does that, he has answered the challenge, and the other party must similarly produce evidence to show that his contrary view is also supported by some arguable evidence. Where both parties present in their affidavits such evidence in support of their assertions, then only

there is an issue that requires to be resolved. If the issue is a matter of law, interpretation of the documents, or of inference or conclusion to be drawn from facts not disputed or documents the authenticity of which is not disputed, then it is obvious that no trial with witnesses necessary and submissions in a hearing will suffice. If the nature of the oral evidence disclosed shows a conflict, it is obvious that the matter cannot proceed as an affidavit based application and orders need to be made under O. 15 of the Rules of the High Court 1980 for the matter to proceed as a writ action so that the witnesses whose oral evidence are conflicting can be examined and cross-examined before a finding of fact is made. This is the meaning of a "triable issue" or a "serious issue to be tried". It is "serious" in the sense it is not a bare or frivolous dispute without evidence to back it up, but because there is arguable evidence to back it up, and a trial is necessitated to decide between the two sets of competing arguable oral evidence by testing the credibility and reliability of the witnesses.

[14] An application under O. 14 r. 1 Rules of the High Court 1980 is made to enter judgment upon the grounds that the defendant has: (a) no defence to a claim included in the writ, or to a particular part of such a claim; or (b) has no defence to such a claim or part except as to the amount of any damages claimed. The burden is upon the plaintiff to show that there are no triable issues.

Findings

[15] It is an undisputed fact that at the material time of the proposal, the 1st defendant was in arrears of his restructured payment schedule, and had failed to place a further 1 million non-moratium shares of HHB and to pay the interest which was to be kept current and payable monthly. The plaintiff's letter of 28 January 2002 required the defendants attend to the terms of the restructuring exercise before the defendants' proposal could be considered favourably. It was, therefore, for the defendants to respond to that letter or comply with those agreed terms before their proposal would be considered. It was not an outright refusal on the part of the plaintiff. This question of fact requires no trial as it is solely based upon a consideration and appreciation of the written communication between the parties, and which documents are produced before this court.

[16] The effect of the 1st defendant's proposal in encl. (6) exh. A of 11 January 2001 to the plaintiff would be to return to the 1st defendant to dispose of the same, upon a time of its choice, the very shares that had been charged to the plaintiff and which is, therefore, at the disposal of the plaintiff to protect its own interest. These terms, in the light of the fact that the defendants had not complied with the terms agreed upon in the restructured plan, would place the plaintiff under added risk, since by returning the shares to the 1st defendant for disposal by the 1st defendant at the time of its choice, the plaintiff would lose its right under the terms of the security to dispose off the shares to protect its interest. It is, therefore, not unreasonable to respond to such proposal by requiring the 1st defendant to comply with the terms of the restructure as agreed before it could be considered favourably. This question of fact is a finding or conclusion be made by the court upon a consideration and appreciation of the documentary evidence. No issue requiring a trial arises.

[17] The suggestion that the price of shares is between RM2 - RM2.50 per share was denied by the plaintiff. Exhibit E being the prices of HHB shares was challenged as being a statement from the 1st defendant. That was answered by the 1st defendant in his second affidavit by exhibiting the prices from "The Star". In the absence of any evidence from the plaintiff to dispute the accuracy of the report from The Star, the court could accept the same as correct, and that it substantially supports the 1st defendant's assertion of the price of the shares. It is then no longer an issue of fact to be tried. No issue requiring a trial arises.

[18] The defendants have argued that the disposal of 2 million shares at RM2 would reduce the outstanding sum and the balance would be adequately secured by the remaining 1.3 million shares. Having so averred that the outstanding sum could be substantially reduced, the defendants did not provide what was the actual outstanding sum, what the balance would be after the reduction, and when the sale and the reduction would be effected. Without such particulars there is nothing before the court to enable it to consider judicially whether the refusal, if the letter of 28 January 2002 is held to be a final refusal, is unreasonable, inequitable and *mala fide*. I note that the defendants did not pursue the matter further for example, to proceed to further elaborate upon its own

proposal after the plaintiff's reply on 28 January 2002. If the defendants were serious and such a plan was in fact in place, I would expect the defendants to proceed with further elaboration and respond to the question of its compliance with the restructure plan. There is, as a result, no material before the court for judicial consideration for the exercise of its discretion whether there is an issue of fact to be put to a trial.

[19] The plaintiff can, ordinarily as a secured lender, sit back and do nothing: *Palk & Anor v. Mortgage Services Funding Plc* [1993] Ch 330. A secured lender is not obliged to take steps to realise his security. Market prices may fluctuate from time to time, and it is impossible to say for certain what that price would be. Hence the law does not require that the secured must wait or delay. He is entitled to sell at any time of his choosing after the conditions of the agreement enabling him to sell arises. The secured lender is entitled to sell even if the chargor does not wish him to sell yet. The secured lender is entitled to exercise his own judgment to prefer his own interest. After all, the security is given to secure his interest. The event that the price of shares dipped after the material date in this case is as fortuitous as if it had risen. I note that the proposal was for the right to sell not immediately but that the timing of the shares was to be dependant upon market sentiment. It is evident that the defendants themselves were not certain that the material time was the best time for a sale. The argument now advanced by the defendants has only the wisdom of hindsight. It is clear the defendants have not suggested an immediate sale. These findings of mixed fact and law rest entirely upon the law and the 1st defendant's own proposal letter. No issue requiring a trial arises.

[20] The defendants have clearly failed to show there are any issues of fact in this case that require a trial. The issues raised are only matters of submissions. There are no triable issues as such. On the basis of the material before the court, there is no basis to conclude the action of the plaintiff was unreasonable or inequitable. The defendants have also not set out before the court the nature of evidence it relies upon to prove *mala fide* to enable the court to decide whether there are indeed triable issues as to *mala fide*.

Order

[21] The appeal was, therefore, dismissed with costs. In this event, the counter-claim is also dismissed with costs.